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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JAMES CONTANT, et al.,

4 Plaintiffs,

New York, N.Y.

5 v.

17 Civ. 3139 (LGS)

6 BANK OF AMERICA CORPORATION,
7 et al.,

8 Defendants.

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9
10 November 15, 2018
10:43 a.m.

11 Before:

12 HON. LORNA G. SCHOFIELD,

13 District Judge

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THE COURT: You may be seated.

(Speakerphone connection established)

THE CLERK: Hi, counsel on the phone, are you there?

Hello?

(Pause)

Hello. Can you hear me now, counsel on the phone?

SPEAKERPHONE VOICE: Yes, we can hear you. Thank you.

THE CLERK: OK. Great.

So we are here in the matter of 17 Civil 3139, and
we're here before the Honorable Lorna G. Schofield.

Counsel, your appearances are stated on the record.

THE COURT: OK. Good morning. We're here really on
two separate matters. One is the preliminary approval hearing
for the proposed settlement between plaintiffs and the Citi

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1 defendants, and the other is an initial Rule 16 conference. I
2 would like to take the preliminary approval issue first, but
3 everybody can just stay where they are.

4 And through Mr. Ruffino --

5 MR. RUFFINO: I am counsel for Citibank.

6 THE COURT: So I will focus on this triangle for the
7 first part of our conference.

8 So I have reviewed the motion papers. Let me hear
9 from the plaintiffs.

10 MR. DELL'ANGELO: Good morning, your Honor.

11 THE COURT: Good morning. Could you speak into the
12 mic?

13 MR. DELL'ANGELO: Yes.

14 Good morning, your Honor. Michael Dell'Angelo, from
15 the law firm of Berger Montague, on behalf of the plaintiffs.

16 We're pleased to present to you today a motion for
17 preliminary approval of a settlement between the plaintiffs and
18 the Citi defendants. As we've outlined in our papers at docket
19 155, we believe that the settlement is fair, reasonable and
20 adequate and satisfies both the Grinnell factors and the Rule
21 23 factors.

22 A brief overview for your Honor is that the settlement
23 was reached while the initial motion to dismiss in this case
24 was pending. There was considerable uncertainty about the
25 direction of the case. After very extensive negotiations with

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1 Citi, the parties reached a settlement that provides for a
2 \$9.95 million cash payment for the class from which up to
3 \$100,000 can be used for notice and identification of class
4 members as part of the development of a plan of allocation,
5 which is part of the settlement.

6 At the preliminary approval stage, we've requested to
7 follow the work that we believe needs to be done to identify
8 class members and develop a plan of allocation, which is
9 consistent with what the Court did in the FOREX case and some
10 other courts in this district have done when there are multiple
11 parties and settlements are staggered.

12 An important element of this settlement is that it
13 also provides for significant cooperation from Citi, including
14 the production of certain documents that Citi produced in the
15 FOREX case as well as transactional data, an attorney proffer,
16 and other cooperation in addition to a process where the
17 parties would meet and confer about the production of
18 transactional data to plaintiffs from Citi Pulse, which is a
19 retail broker that Citi operated.

20 THE COURT: And how is the identification of the
21 retail dealers being handled?

22 MR. DELL'ANGELO: So that actually leads into, your
23 Honor --

24 THE COURT: Let's not go into that. Let's just talk
25 about what the arrangement is between you and Citi.

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1 MR. DELL'ANGELO: OK. So as I understand the terms
2 and as part of the discussion that we'll have with Citi, but
3 the first component is that Citi will be providing us with
4 transactional data, and that transactional data --

5 THE COURT: What transactional data?

6 MR. DELL'ANGELO: The transactional -- the
7 transactions that Citi engaged in with what for purposes of
8 kind of discussion in this case we would call the eligible
9 settlement class members in FOREX. And as we've laid out in
10 the preliminary approval papers as well as the motion for leave
11 to amend the papers that you decided recently, that there is
12 this flow essentially from the defendant banks to the eligible
13 settlement class members to the plaintiffs in this case.
14 Those, quote, eligible settlement class members include retail
15 brokers. That is the primary corpus of entities with whom our
16 plaintiffs would have transacted. So the transactional data
17 that Citi would be providing to the plaintiffs in this case as
18 part of the settlement would include identification of the
19 retail brokers so that we can then kind of match who the
20 plaintiffs would have transacted with --

21 THE COURT: And how do you identify who those
22 plaintiffs are?

23 MR. DELL'ANGELO: So the way we structured the class
24 definition is that to be within the scope of the class in our
25 case, you needed -- it is limited to eight states that we have

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1 specified in the complaint and the papers, and the individuals
2 in those states needed to have transacted with essentially, for
3 simplification of this discussion, a retail broker --

4 THE COURT: How do you find them? How do you know who
5 that is?

6 MR. DELL'ANGELO: Who those individuals are? So the
7 retail brokers, the easiest way --

8 MR. SCHWARTZ: Your Honor, I am having a very hard
9 time understanding what he is saying.

10 THE COURT: OK. If you could just pull the mic very
11 close, stand it straight up, and pull it right up to the edge
12 of the table so it is under your chin.

13 MR. DELL'ANGELO: OK. If I may come around, your
14 Honor, I think it is stuck on the monitors.

15 THE COURT: OK.

16 MR. DELL'ANGELO: Thank you.

17 THE COURT: You can also use the podium, if you
18 prefer, but the mic is just the same.

19 MR. DELL'ANGELO: This is fine for now. If it doesn't
20 work, I will move to the podium.

21 THE COURT: OK. Is that better.

22 MR. SCHWARTZ: Yes, it is, your Honor.

23 MR. DELL'ANGELO: OK. Thank you.

24 So as we understand it, the transactional data that
25 the retail broker has would identify the individual or entity

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1 that transacted with the retail broker. And, you know, there
2 is --

3 THE COURT: So the idea is to get the names of the
4 retail brokers who are essentially the class members in FOREX
5 and then to do third-party discovery and get from them -- or
6 some informal discovery -- in any event, get from them in some
7 fashion who they transacted with during the class period?

8 MR. DELL'ANGELO: Yes, your Honor, and that's
9 certainly one way to do it. Another -- by analogy, another way
10 that it could be done is in the securities context, when you
11 have a 10b-5 case under the PSLRA, for example, typically
12 because the individuals or entities who transact in a
13 particular stock, say for purposes of this discussion, will do
14 so in what's called street name, and then so instead of getting
15 the names of every individual that transacted in a particular
16 security, what courts typically do is require the notice to be
17 sent to the broker and the broker then sends the notice to the
18 individuals with whom it was transacting in street name, that
19 is, their customers. It is another way to approach it. I
20 think there are a couple of options that we have and that we
21 can kind of when we get to the --

22 THE COURT: That is for a later day.

23 MR. DELL'ANGELO: When we get to the due process
24 issues, I think we can do a lot of --

25 THE COURT: So do you have any idea how many class

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1 members there are?

2 MR. DELL'ANGELO: So we have some very rough
3 estimates, but I think at this stage it is difficult to
4 identify with precision the number of class members. It's
5 certainly -- at the very low end, it's in the thousands, but we
6 think it is really more like in the tens or perhaps approaching
7 the hundred-thousand mark. What we know is if, for example, we
8 just look at the CFTC data, we can get a pretty clear picture
9 of the amount of FX funds that were being held by retail
10 brokers on behalf of retail customers, and we can also have
11 gathered some data from those retail brokers about the number
12 of accounts that they have, for example. Now, one individual
13 might have multiple accounts but each account in theory would
14 have a claim. So it certainly put us into what we think are
15 the tens of thousands, but that's as precise as we have been
16 able to get at this stage.

17 THE COURT: And do you have any idea what the
18 potential exposure is of the defendants with respect to those
19 tens of thousands or hundreds of thousands?

20 MR. DELL'ANGELO: You mean the total potential
21 liability of the case, your Honor?

22 So the way we approach that question, understanding
23 the backdrop of the time in which we've reached this settlement
24 was in the very early days, and so what we were really
25 constructing was what we viewed as an ice-breaker settlement,

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1 is we did some research and dealt with some experts trying to
2 understand the scope of the various markets that may fall
3 within the class definition. And it is certainly a subset of
4 the FOREX case, and I think it is a relatively small subset.

5 THE COURT: Why do you think that?

6 MR. DELL'ANGELO: Well, because the -- based on there
7 is data from a variety of sources that gives some insight into
8 the scope of retail FX transactions relative to the total
9 universe of FX transactions, and so we looked at that data to
10 get a sense of what the relative size of the two is. But then
11 this case is a little unique in that the plaintiffs hailed from
12 eight of the 50 states in the United States. Some of them,
13 like California, Illinois, Florida, California are very
14 populous states.

15 THE COURT: And the settlement is limited to those
16 states.

17 MR. DELL'ANGELO: That is correct, your Honor.

18 THE COURT: OK.

19 MR. DELL'ANGELO: So the settlement classes with Citi
20 tracked the settlement classes alleged in the complaint, so it
21 is not nationwide. So --

22 THE COURT: But when you struck this deal on the
23 number, you didn't know how many states would be potentially in
24 play?

25 MR. DELL'ANGELO: I think we did, your Honor, because

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1 the complaint only alleged classes on behalf of those eight
2 states. So we knew --

3 THE COURT: At most it would be eight.

4 MR. DELL'ANGELO: That is correct. And the
5 discussions that we had with Citi, as we've indicated in the
6 papers, took place over a considerable amount of time. And
7 there was a vigorous exchange about, you know, for example, we
8 looked at a variety of ways, you know, what percentage of the
9 U.S. population may be represented by, you know, the residents
10 of those states relative to, you know, other ways of looking at
11 that.

12 THE COURT: So let me just share my thinking with you.

13 MR. DELL'ANGELO: Sure.

14 THE COURT: Everything that you have said in the last,
15 I don't know, ten minutes, five minutes, is critical to my
16 consideration of whether the settlement is fair, reasonable and
17 adequate. In your papers, you didn't say any of that. So
18 reading your papers, and even to some extent listening to you
19 now, I have no idea whether this is fair, reasonable and
20 adequate, and so I can't preliminarily approve a settlement
21 without having some of that information.

22 And so that means I need to have at least a sense of
23 the size of the universe of these transactions and what they're
24 worth. So, I'm going to deny your motion without prejudice and
25 let you proceed however you would like to figure out what you

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1 need to figure out and you may present it in a -- you can
2 simply renew your motion, if you intend to do that at some
3 point, and file a supplement, and I'm happy to consider it in
4 that way, and you should, I guess, file a new notice of motion
5 just so it appears as a new motion.

6 MR. DELL'ANGELO: Sure.

7 THE COURT: And we'll go from there.

8 MR. DELL'ANGELO: OK.

9 THE COURT: OK.

10 MR. DELL'ANGELO: Thank you, your Honor.

11 THE COURT: Thank you. All right.

12 So, let's talk now about the case management of the
13 remainder of the case. And I have your submissions, and I
14 appreciate your trying to present in a clear way what the
15 issues are, what the positions of the plaintiffs and defendants
16 are on the issues. Even though this is all logistical and
17 planning, there are many, many, many issues and it felt a
18 little bit like Where's Waldo and I was trying to figure it all
19 out. So what I propose to do is let's walk through the
20 proposed case management plan. I will address the issues that
21 seem to arise obviously there, and then if there are additional
22 issues, you can bring them to my attention.

23 So it seems to me that the first questions arises on
24 page 2 at the bottom, fact discovery deadline. And it seems
25 everyone agrees that it shall be completed by a date to be

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1 agreed to, but there is no date agreed to. So I think we need
2 a control date. I understand it's difficult at this point to
3 really have much of a good sense of how long it will take, but
4 I think we need a control date and we need to try to aim for
5 that control date.

6 So, I would like to set that as May 2nd, which is, of
7 course, much longer than I normally contemplate. I know there
8 are a couple of -- well, more than a couple of wrinkles here
9 with the DOJ stay, also with the fact that some discovery that
10 is relevant has already taken place in the other case and that
11 it is voluminous, but I will set May 2nd as the date.

12 So that brings us to the production of documents. And
13 as I understand it, the first question is -- and now I'm on
14 page 3 -- with respect to the documents that everyone agrees
15 are to be produced, which is I think principally the relevant
16 FOREX documents, as I understand it, the plaintiffs' position
17 is that this information would be producible within 30 days
18 from the entry of a protective order. Is that right?

19 MR. DELL'ANGELO: That is correct, your Honor.

20 I would just note that in the agreement that we have
21 with Citi, they were able to -- they agreed to do it within 15
22 days of the entry of a protective order. Just for your
23 benefit, I would also note that on Tuesday of this week, we --
24 the plaintiffs prepared a form of protective order that is
25 substantially in the form of the protective order that you

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1 entered in FOREX and circulated that to both Citi and all the
2 nonsettling defendants.

3 THE COURT: Have you heard back from them?

4 MR. DELL'ANGELO: We have not.

5 THE COURT: OK. As I understand it, the defendants
6 would like it to be the later of that date or January 11th as
7 an outside date. Is that right?

8 MR. SCHWARTZ: That is corrects, your Honor. You
9 know, given the numerous banks that are involved here and, of
10 course, the holidays that are coming up, for some of the banks
11 I think January 11th is a much more realistic timeline for
12 those of us who produce within 30 days. We will obviously
13 endeavor to do that.

14 I would note there is a slight disagreement for us.
15 We would like to follow the NYPL precedent that your Honor set
16 out where the defendants that are not moving to dismiss under
17 Rule 12 will make the production and the defendants that are
18 moving to dismiss under Rule 12 will hold off until your Honor
19 rules on that motion. My understanding is that just based off
20 of the structure of the various bank groups that are named in
21 the complaint, that means that there will be a production of
22 documents I think from the majority of the defendants and even
23 from some of the bank group defendants where perhaps a parent
24 entity is moving to dismiss for lack of personal jurisdiction.

25 THE COURT: OK. And what is the plaintiffs' position

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1 on this last issue, the distinction between the moving
2 defendants and the nonmoving defendants?

3 MR. DELL'ANGELO: So as a practical matter, if the
4 preliminary -- or if the protective order is entered, it seems
5 to us, particularly now that the Court has set at least an
6 initial discovery deadline of May, which is relatively short
7 given the volume of documents and work to be done in this case,
8 that the sooner we could get the materials and start working
9 through them, the better that would be in part because there is
10 this issue, which I'm sure the Court will get to, about our
11 participation at depositions and the need to get up to speed to
12 do that effectively.

13 And I would also just note, your Honor, that I think
14 where we came out on that, even though Citibank has indicated
15 that they could do it in 15 days, I think part of what that
16 30-day deadline was driven by was when the amended complaint
17 was filed and the process for answering or filing a motion to
18 dismiss. So the absence of one would trigger the fact that the
19 a defendant would be answering.

20 But from our perspective, if the protective order is
21 entered, which seems to me it should be relatively easy to do
22 with the Court's approval, that the defendants who intend to
23 file a Rule 12 motion should produce them nevertheless, because
24 even if they are out of the case, I think there is a process
25 where at least with respect to some them we would be pursuing

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1 those documents in any event.

2 THE COURT: OK. So it's hard to take first things
3 first because everything seems to be related. It sounds like
4 chronologically the first thing that needs to happen is the
5 proposed protective order, and plaintiffs have proposed the
6 22nd, which is Thanksgiving. So let's not use that as the
7 date, but I would like the parties to submit to me a proposed
8 protective order that you all agreed to by let's say the 29th,
9 so that's two weeks from today.

10 And then in terms of the initial production, what I
11 would like to do is have -- well, so --

12 MR. SCHWARTZ: Your Honor, if it helps? If the Court
13 very quickly enters the protective order, that's probably
14 either very late November or early December. Within 30 days
15 would then put us smack between Christmas and New Year's, which
16 is one of the reasons that we asked for January 11th. We think
17 it is just a little bit of breathing room throughout the
18 holidays, especially with our clients who are outside of the
19 United States.

20 THE COURT: OK. So what I will do is I will use the
21 January 11th date, but I would like to ask for rolling
22 production so that to the extent you can produce earlier or
23 produce in part earlier, I would ask you to do that.

24 So I guess that leaves only the question of the
25 defendants who would be moving to dismiss. And do we know who

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1 plans on moving to dismiss?

2 MR. SCHWARTZ: Your Honor, certain of the defendants
3 with non-U.S. parent companies are intending to move to dismiss
4 under Rule 12(b)(2) for lack of personal jurisdiction. I am
5 not positive exactly which of the defendants, but it will be
6 more than one defendant that does that. Currently, I am not
7 aware of any defendant that plans to file a Rule 12(b)(6)
8 motion, but I understand that some people may still be
9 considering whether or not to do that.

10 THE COURT: OK. So with respect to Rule 12(b)(2)
11 motions, I would like to encourage the parties to talk to the
12 plaintiffs and I would -- I've written a lot about personal
13 jurisdiction in this case over foreign entities, so there is a
14 lot of precedent there and I'm inclined to follow it. So if
15 you would please consider the arguments that these parties are
16 making in light of my prior rulings and act accordingly, it
17 will save us all a lot of hopefully unnecessary motion
18 practice.

19 MR. DELL'ANGELO: I appreciate that, your Honor. And
20 in crafting the proposed amended complaint that was attached to
21 our motion for leave, which you granted, we did take that into
22 consideration, but with the understanding with your comments
23 here today, we will go back and take another look at that and I
24 would be happy to engage with any of the defendants.

25 THE COURT: Well, my procedure calls for an exchange

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1 of premotion letters. So as soon as we get the amended
2 complaint filed, then there will be an exchange of letters.
3 You will be on notice what the arguments are, and that should
4 facilitate a discussion.

5 MR. DELL'ANGELO: OK.

6 MR. SCHWARTZ: Thank you, your Honor.

7 THE COURT: OK. So that leaves us with a question of
8 whether the moving defendants should have to produce at least
9 the initial production of FOREX material. And I guess it
10 doesn't make -- I don't know whether those defendants, for
11 example, you know, foreign parents have documents from FOREX
12 that would be producible.

13 MR. SCHWARTZ: So, your Honor, what we did in the NYPL
14 case, if I recall correctly -- if I don't, I apologize -- but
15 your Honor said you are not inclined to order discovery from
16 parties that are moving to dismiss for lack of personal
17 jurisdiction.

18 THE COURT: And that would be my inclination here as
19 well. I don't normally stay discovery for motions to dismiss.
20 On the other hand, if there is a jurisdictional question -- I
21 also wonder how much of those particular entities produced in
22 FOREX anyway.

23 MR. SCHWARTZ: So, your Honor, I think that is the
24 relevant question here. Even in the NYPL case, just based off
25 of the productions that were made, for example, we did Barclays

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1 as a bank group. Even though the parent company moved to
2 dismiss for lack of personal jurisdiction, there was still
3 production of the FOREX documents from the Barclays entity that
4 did not move to dismiss for lack of personal jurisdiction. And
5 so in that case the NYPL plaintiffs got effectively the entire
6 FOREX production from Barclays.

7 I can't say that that is going to be the case for each
8 of the defendants in this particular matter. Some of the
9 defendants were, you know, not named in NYPL, for example.
10 Some of the defendants in the FOREX case made much smaller
11 productions that may have come from the parent company. My
12 understanding is that there will still be millions of documents
13 produced, and they will get the bulk of the productions from
14 the bank groups. But I just don't have the roster of exactly
15 which bank entity is going to be producing exactly what for
16 this in part because I don't think every entity has decided
17 whether or not to join in the motion.

18 THE COURT: So what I will put in the scheduling
19 order, then, is that defendants who are bringing 12(b)(2)
20 motions will be excused from this production at least until a
21 decision on the motion. Any defendant who brings a 12(b)(6)
22 motion -- and after the opinion that I wrote on leave to amend,
23 I certainly hope that there aren't any such motions, but to the
24 extent there are, I'm not staying discovery for 12(b)(6)
25 motions.

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1 MR. SCHWARTZ: Understood.

2 THE COURT: OK. All right.

3 So, actually, why don't you all tell me what the next
4 issue is, then.

5 MR. DELL'ANGELO: Well, I think one of the key
6 issues -- I think there is a lot of agreement here, your Honor.
7 I think one of the key issues from our perspective of
8 disagreement is about the timing in which the parties can
9 undertake their party discovery. So as understand it, the
10 defendants' position is that they should be allowed to proceed
11 with discovery essentially -- that is, serve discovery requests
12 within 14 days of the entry of the protective order. But the
13 plaintiffs may receive two categories of documents that the
14 defendants have agreed to produce, which are the FOREX
15 documents and certain transactional data which the parties
16 would meet and confer about. We couldn't reach an agreement
17 about the timing of the production of the data, so that's one
18 issue. But I think --

19 THE COURT: You need to talk about that, though. I'm
20 not in a position to be very helpful.

21 MR. DELL'ANGELO: That is correct, and I'm really just
22 framing that. It's not really an area of disagreement. So in
23 an effort to reach as much consensus --

24 THE COURT: Let me just interrupt for a minute.

25 MR. DELL'ANGELO: Yes.

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1 THE COURT: I don't understand why we should wait or
2 impose any deadline before which a request for documents can be
3 served. I mean, it will take you some time to figure out what
4 you want to ask for. Perhaps you've figured it out already.
5 The sooner you get the request out there, the better. Nobody
6 thinks that they're going to be able to produce everything
7 within 30 days anyway. You will have a discussion and
8 negotiation. So I don't see why I should set some arbitrary
9 time before which you can't file or send a request for
10 documents.

11 MR. DELL'ANGELO: I generally share that view, your
12 Honor. I think the issue from our perspective is the structure
13 that the defendants wanted to create was to make, in our view,
14 discovery both a sword and a shield. So their proposal, as I
15 understand it, was the plaintiffs can have the nontransactional
16 documents from FOREX. We'll agree to produce transactional
17 data but we'll meet and confer, no commitment on time. To the
18 extent plaintiffs would like to serve document requests to get
19 any additional discovery, we first have to review all 1.3
20 million documents --

21 THE COURT: OK. I don't agree with that.

22 MR. DELL'ANGELO: That was really --

23 THE COURT: But I will hear from the defendants.

24 MR. SCHWARTZ: Your Honor, I guess we have heard your
25 view on that. One of the major issues for us is getting the

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1 information about who these supposed retail FX dealers are.

2 THE COURT: Well, you think you are getting it from
3 them but they don't have it, so.

4 MR. SCHWARTZ: Which is a problem if they want to
5 propose a class action. They certainly have the information as
6 to who their named plaintiffs transacted with, or I hope they
7 do. They fired a purported expert. They claim in their
8 complaint to understand how this market works. They should
9 have the information about who these retail FX dealers are.
10 What they've asked for from us in terms of the data is for us,
11 first of all, to identify who the class members in the FOREX
12 case are. We can't really do that, your Honor. That's
13 something that the plaintiffs' counsel in the FOREX case would
14 know, because the way they've determined who those class
15 members are is taking data from us and then taking data from
16 the FOREX class members themselves and figuring it out. And
17 they weeded out a lot of entities and they probably included
18 some entities that weren't necessarily readily available from
19 the data.

20 So, first, we don't know that. And then, second of
21 all, then they wanted it to be incumbent upon us to identify
22 who the retail FX dealers are within that. I mean, normally
23 that would be something that the plaintiffs should do, and from
24 our perspective, we know that your Honor obviously took as true
25 the allegations in the complaint. We don't think the retail FX

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1 dealer market works remotely in the way they have describe it.
2 And so from our perspective the real key discovery in this
3 case, both for class certification opposition and for a summary
4 judgment motion, is to get third-party discovery from these
5 purported dealers so we can demonstrate to your Honor that in
6 fact the facts as alleged in the complaint aren't correct.

7 So for us, we at a minimum should be getting from them
8 the names, which they've agreed to do, of the FX dealers with
9 whom the named plaintiffs transacted, but, really, you know,
10 they are the ones who, based on their complaint and based on
11 their experts, should be identifying who these dealers are, and
12 if they do that for us, then we can isolate the data that we --

13 THE COURT: So let me ask a different question. I
14 understand your point, but they have raised at least what on
15 the face of the complaint looks like a colorable claim and it
16 looks like a colorable class claim. Whether it is or not, I
17 have no idea. But given that, it seems to me that both sides
18 have an obligation to produce documents relevant to the claims
19 and defenses here, but that is limited, of course, by the
20 proportionality rule and just common sense about how do we go
21 about this efficiently.

22 And I understand your point that simply identifying
23 everybody who you viewed as -- and I mean "you" as the
24 defendants broadly -- viewed as potential settlement class
25 members in FOREX, without knowing exactly where it ended up, is

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1 overbroad for two reasons. One is you don't know what the
2 actual universe is, and, two, it is more than just the retail
3 brokers.

4 So the question is -- you will know this better than
5 I -- what is the most sensible way collaboratively to figure
6 that out, because I believe both sides have discovery
7 obligations?

8 MR. SCHWARTZ: So, your Honor, what I would suggest is
9 that the plaintiffs, based on their knowledge of the market,
10 based on their consultation with the experts, based on the work
11 that they're going to do in order to give your Honor a sense of
12 the market and the participants in the market for purposes of
13 the preliminary approval of the Citi settlement, identify for
14 the defendants who they believe these retail FX dealers are,
15 and once they do that, the defendants can then produce the spot
16 data that is relevant to those particular transactions.

17 THE COURT: But they don't know.

18 MR. DELL'ANGELO: May I --

19 THE COURT: Maybe I'm wrong. Maybe they do. Let's
20 hear from them.

21 MR. DELL'ANGELO: May I interject? Because I think I
22 can help facilitate this a little bit.

23 THE COURT: OK.

24 MR. DELL'ANGELO: I think there may be either a
25 misunderstanding or a presentation of some of the joint

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1 portions of the letter that are not consistent with at least
2 our understanding of the language. So looking at docket 170 on
3 page 1, the first paragraph is a joint statement. The last few
4 lines of that joint statement --

5 THE COURT: Wait. 170 is the letter?

6 MR. DELL'ANGELO: Yes, it is, your Honor.

7 THE COURT: OK. Go ahead.

8 MR. DELL'ANGELO: I am looking at the first page, the
9 first paragraph identified as "Joint Statement."

10 THE COURT: Yes.

11 MR. DELL'ANGELO: And at the very -- just because it
12 is a very long sentence, what it essentially says, if you look
13 at the last line, is that defendants will produce transactional
14 data from entities identified by plaintiffs as retail foreign
15 exchange dealers. So I think the notion that we have no idea
16 of who they are or that we have not agreed to identify those
17 whom we know to be retail foreign exchange dealers is not
18 correct. And I think that's the scope of the agreement, and it
19 is in part how we got there because initially what we had said
20 is please tell us who the settlement class members are. We
21 understand from defendants why that is not a feasible request
22 so we crafted this solution. We have a way of identifying what
23 we think constitutes at least most of the universe of those
24 retail FX dealers --

25 THE COURT: So you know who comprises most of the

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1 universe?

2 MR. DELL'ANGELO: We do believe that we do, your
3 Honor.

4 And so I think that we already have an agreement with
5 the defendants on that point, but we will identify --

6 THE COURT: So what are we arguing about?

7 MR. DELL'ANGELO: I don't know your Honor, to be quite
8 frank.

9 THE COURT: Maybe nothing.

10 MR. DELL'ANGELO: I think there is one small area of
11 disagreement, which is -- just to give a little context, we had
12 initially, as I indicated, asked the defendants to identify the
13 settlement class members in FOREX. They explained to us why
14 that wasn't feasible. What we then suggested is if they were
15 to identify the eligible settlement class members, which would
16 just be the universe of entities with whom the defendant
17 transacted in FX during the class period in our case, which --

18 THE COURT: Is there any way for you to just ask the
19 folks in FOREX who they are?

20 MR. DELL'ANGELO: We could, but I would expect that
21 the defendants would more readily know who they are, but we can
22 certainly ask the people in FOREX. What we felt we could do,
23 your Honor, was take the universe of retail FX brokers that we
24 know and then take the eligible settlement class members in FX
25 and compare those two lists and just make sure that we're not

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1 missing any so that we don't -- both sides don't end up with
2 issues where there is an entity that they're interested in
3 getting discovery on and we've sort of completed what we need
4 to do --

5 THE COURT: Why don't we take this one step at a time.

6 MR. DELL'ANGELO: Sure.

7 THE COURT: You have a big part of this universe.
8 Let's work with that.

9 MR. DELL'ANGELO: OK.

10 THE COURT: Talk to the plaintiffs' counsel in FOREX.
11 See if you can reach some understanding about that. And if
12 there are still issues or cleanup work to be done after that,
13 you can talk to each other. If you can't reach agreement, then
14 you can come back to me.

15 MR. DELL'ANGELO: OK.

16 THE COURT: OK?

17 MR. DELL'ANGELO: Yes. Thank you, your Honor.

18 MR. SCHWARTZ: Thank you, your Honor.

19 THE COURT: OK. So, does that take care of the
20 basically document production issue?

21 MR. SCHWARTZ: I think in general it does, your Honor.
22 I think there will obviously be -- well, not "obviously" but
23 we'll obviously look at their requests and see if we have
24 objections and responses to them and we'll come back to you.

25 One thing that does appear to be on the horizon --

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1 but, again, we won't know until we see it -- is that they have
2 a request for a much larger set of data than just the data that
3 deals with retail FX dealers, and we'll have some issues with
4 that, but discovery disputes will be handled in the normal
5 process, your Honor.

6 THE COURT: OK. That sounds reasonable.

7 So I'm now turning to page 4. I'm not going to
8 schedule any expert discovery or dispositive motions at this
9 time.

10 And with regard to lifting the stay of discovery,
11 obviously what we've been talking about is proceeding with
12 discovery so I will lift the stay.

13 And then with respect to joint status letters -- I'm
14 in paragraph 13A -- I would like them every 45 days, beginning
15 45 days from today.

16 And then I will schedule a conference for May 16th at
17 11, which is about two weeks after the discovery cutoff I set.
18 And you need to get to me at least two weeks before that any
19 premotion letters or dispositive motions or class certification
20 motions, and we'll set a briefing schedule at that time for any
21 motions that it makes sense to proceed with.

22 And then with respect to the filing of the amended
23 complaint, it sounds like in paragraph 14 on page 6 you all
24 have agreed to a schedule, so I will adopt that schedule.

25 So given all that, what else do we need to talk about,

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1 if anything?

2 MR. SCHWARTZ: So, your Honor, there are two quick
3 issues that I would raise.

4 THE COURT: OK.

5 MR. SCHWARTZ: I understand your Honor set May 2nd as
6 sort of the control date. I would sort of preview for your
7 Honor in advance that that is in our view an aggressive date
8 given that a lot of the discovery is going to be third-party
9 discovery. Some of the discovery the plaintiffs made for pound
10 will be of deposition deponents who are outside the United
11 States, and of course there is going to be a lot of document
12 production back and forth. I think your Honor understands
13 that. I just wanted to sort of state that on the record as
14 point one.

15 THE COURT: I do. I also like to move discovery
16 along. Part of the purpose of status letters is to let me know
17 what's happening and to show me that everyone is moving as
18 expeditiously as possible. You are, in essence, making a
19 record in case you need to ask for more time. So the status
20 letters are actually very important to me. And my individual
21 rules also say what goes in the status letters, but you now
22 understand, sir, what my orientation is.

23 MR. SCHWARTZ: Of course, your Honor.

24 And the second thing to ask for is the Court now has
25 before it four different FX matters. It has this matter. It

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1 has the NYPL matter. It has the continuing consolidated class
2 action against the Credit Suisse defendants. And I don't know
3 if your Honor saw but --

4 THE COURT: The Allianz.

5 MR. SCHWARTZ: Yes, there is the Allianz case that was
6 filed. Defendants are very concerned that if there isn't
7 coordination amongst the plaintiffs' counsel in those cases,
8 that it could subject individuals to potentially multiple
9 depositions, which is not only unfair for those individuals
10 regardless of whether they are party employees or in many cases
11 going to be nonparties at all --

12 THE COURT: I am sympathetic to that. What can I do
13 to help you?

14 MR. SCHWARTZ: Well, your Honor, we talked a little
15 bit in this letter about how the Contant plaintiffs obviously
16 have not participated fully in the FOREX cases going backwards,
17 and so we proposed a standard where, you know, unless they can
18 show prejudice, those deponents could not be deposed again just
19 for this particular action. And we would also --

20 THE COURT: Let me just interrupt for a second.

21 As I understood their positions from the letters, they
22 reserved their right, subject to their review of the
23 transcript. So this is premature.

24 MR. SCHWARTZ: It is a hypothetical, yes.

25 THE COURT: But I will just tell you that I am

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1 sympathetic to trying to make this -- have it cause as little
2 burden as necessary for the defendants and business people at
3 the defendants consistent with giving the plaintiffs the right
4 to do the discovery they need to do.

5 So, if you think it would be helpful to have, for
6 example, an order with all four captions on it with my
7 encouraging the parties to coordinate, or ordering the parties
8 to at least confer to coordinate to the extent possible, and if
9 you would like to submit such a proposed order, I would be
10 happy to look at it.

11 MR. SCHWARTZ: Yes, your Honor. That would be
12 fantastic from the defendants' point of view.

13 THE COURT: OK.

14 MR. SCHWARTZ: The last thing I would ask your Honor
15 is if we were going to try to move discovery along
16 expeditiously, from our perspective the most important
17 information to get from the plaintiffs in this case is their
18 view of who the retail FX dealers are. It is really very
19 difficult for us to sort of make productive defensive or
20 offensive discovery from our side without those names. And so
21 just as your Honor has set a date certain for us to start our
22 production, we would ask for a date certain for the plaintiffs
23 to give us those names. And if the plaintiffs have those
24 names, it shouldn't be difficult to get something that they can
25 produce very quickly.

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1 THE COURT: I will ask Mr. Dell'Angelo when you would
2 be prepared to produce at least the lion's share of those
3 names?

4 MR. DELL'ANGELO: Sure. Understanding that next week
5 is a holiday week, I think we probably could send that list
6 over sometime next week, your Honor.

7 To be quite frank, that joint statement that I
8 identified on page 1 of docket 170 about triggering the
9 defendants' obligation to provide us with the transactional
10 data, we are motivated to get them that information in any
11 event. So, I expect that we should be able to do that next
12 week.

13 THE COURT: So let me set a date of Wednesday of next
14 week. Does that make sense? Thursday is Thanksgiving.

15 MR. DELL'ANGELO: That would be fine.

16 If I may, Judge, just, your Honor, with the
17 understanding that to the extent, you know, as we continue to,
18 you know, consult with experts and do discovery, we may
19 identify additional ones --

20 THE COURT: Of course.

21 MR. DELL'ANGELO: It is a pretty comprehensive list
22 for now.

23 THE COURT: OK.

24 MR. DELL'ANGELO: The one just other caveat I would
25 add, some of the publicly-available data that we have looked at

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1 that has enabled us to identify those retail FX brokers, some
2 of it only goes back to October of 2010, which would be the
3 middle of the class period. So there will be some additional
4 work, which is one of the reasons why we're asking for the
5 eligible settlement class members, but there will certainly be
6 some additional work either by us or with the defendants to
7 identify any that we may be missing as of this time.

8 THE COURT: OK. Understood.

9 All right. I will issue an order. Hopefully, it will
10 reflect what we've talked about today, and we're adjourned.

11 MR. DELL'ANGELO: Thank you, your Honor.

12 MR. SCHWARTZ: Thank you, your Honor.

13 (Adjourned)
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